

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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In the Matter of )  
)  
Implementation of Section 302 of )  
the Telecommunications Act of 1996 )  
)  
Open Video Systems )

CS Docket No. 96-46

To the Commission:

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**REPLY COMMENTS OF**  
**THE MUNICIPALITIES OF BUFFALO GROVE, ELK GROVE, HOFFMAN ESTATES,**  
**ROLLING MEADOWS, AND PALATINE, ILLINOIS**  
**IN CONSORTIA AS THE "REGIONAL CABLE GROUP"**

**OVERVIEW**

The municipalities of Buffalo Grove, Elk Grove, Hoffman Estates, Rolling Meadows, and Palatine, Illinois, who are operating in consortium as the Regional Cable Group, hereby offer their reply comments in support of municipalities participating in the rulemaking regarding Open Video Systems (OVS). The communities of the Regional Cable Group comprise a population of 185,000, including 47,423 cable subscribers. The charge of the member communities of the Regional Cable Group is to oversee and protect the public interest with respect to cable communications services. Continued ability of municipalities to respond to the concerns of the public will be essential when the entry of OVS operators comes to pass. To this end, municipalities seek a substantive participatory role in the certification of OVS operators. Moreover, the responsibility of municipalities to control and protect public rights-of-way and other public properties as recognized by the 1996 Telecommunications Act, increases the need for municipalities to play a vital and essential function in certifying OVS operators. The responsibilities placed upon municipalities by their citizens to develop and enforce public policies which protect and preserve public rights-of-way and other public lands require that municipalities give their permission to OVS operators and their plans for system development and construction.

The municipalities of the Regional Cable Group also believe that the interest of citizens in competition for video services is best served by not allowing cable operators to declare their platforms to be Open Video Systems. Congress plainly stated in the 1996 Telecommunications Act that Open Video Systems would be a mechanism by which telephone companies could enter the video services marketplace.

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By allowing cable operators to function as OVS operators, the FCC would not only be acting against the stated goals of Congress, but would also prevent competition and create an environment for cable operators which would effectively reduce their responsibilities to their subscribers and the communities that they serve.

The Regional Cable Group communities also support a proposal offered to the FCC by the National League of Cities requiring the further protection of Public, Educational, and Governmental access channels (PEG Channels) through a "match or negotiate" format. The Regional Cable Group communities believe that PEG Channels are an essential component of any wire-delivered video platform provided to subscribers, regardless of whether that platform is delivered by a cable company or a telephone company. The promise of OVS should not be undercut by eliminating the need for OVS operators to carry programming of local interest to citizens, particularly programming which supports the need of local citizens, their schools, and governmental entities to communicate effectively with each other.

The idea of competition for video services has broad and enthusiastic support among the municipalities of the Regional Cable Group and their citizens. During the course of several public meetings held since 1994, citizens from throughout the communities of the Regional Cable Group have expressed their desire for more choice in video programming which is relevant to their needs. It is in this spirit that the Regional Cable Group wishes to express its concern that the Commission's OVS rules stay in accord with the goal of Congress to preserve local authority to manage and control public property, receive fair compensation for the management of such public properties, and to protect the public interest through requiring the programming of PEG Channels on OVS platforms.

## **INTRODUCTION**

### **INTEREST OF THE COMMUNITIES IN THIS MATTER:**

The communities of the Regional Cable Group are composed of the Villages of Buffalo Grove, Elk Grove, Hoffman Estates, and Palatine, Illinois, and the City of Rolling Meadows, Illinois. The communities have an aggregate population of 185,000. These five communities have acted together since 1981 in an intergovernmental consortium to address shared needs and concerns regarding cable communications in their communities. The Regional Cable Group consists of ten members which include the Cable Administrator and an appointed or elected official from each community. Each municipality serves as a separate franchising authority with its cable television operator. The current cable television operator serving all five communities is Continental Cablevision of Northern Illinois, Inc.

The Regional Cable Group communities are deeply concerned about the Commission's preparation of OVS regulations. The issues of preservation of municipal authority and control over public rights-of-way and public property and the ability of OVS platforms to carry PEG access programming are of vital interest to the communities.

The Regional Cable Group municipalities are hereby submitting these comments in order to provide a public voice for the record.

**POSITION OF REGIONAL CABLE GROUP MUNICIPALITIES:**

The Regional Cable Group municipalities are in strong accord with the joint comments of the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, and other cities found in the National League of Cities Comments ("NLC Comments") and their suggestions for the OVS regulations. The NLC Comments set forth several essential criteria which the Regional Cable Group municipalities see as vital for preservation of municipal interests. These criteria include meeting community needs and interests for PEG Channels and other requirements set forth by Congress under Title VI of the Communications Act of 1934; deterring discrimination by OVS operators against programmers; stimulating competition by restricting OVS rules to telephone companies only; and recognizing the rights of municipalities to control and manage public rights-of-way and public property, including the requirement of reasonable compensation for use of public rights-of-way and public property.

**CHANNEL ACCESS:**

The Regional Cable Group communities agree with comments made by the National League of Cities, the Alliance for Community Media and others that contracts between OVS providers and programmers must be public. The Regional Cable Group believes that public disclosure of the conditions of the contracts, including rates and fees, would serve to eliminate a potential source of discrimination which may be used against potential programmers. The Telecommunications Act of 1996 prohibited discrimination against programmers committed by an OVS provider. Public disclosure of contracts would serve to uphold Congress' intent.

Along with public disclosure of contracts and the rates and fees stated therein, the Regional Cable Group believes that discrimination against programmers may be further abated by several means discussed in comments by the National League of Cities, Alliance for Community Media, the Michigan, Illinois, and Texas (MIT) Communities stated that:

- \* Rates should be structured, and not applied on an individual case basis.
- \* Rate differentials should be based on specific, verifiable, and simple criteria.
- \* Rate structures and contracts must contain a favored nations clause in order to enable programmers to receive the most favorable terms available. Violation of such a clause by an OVS operator would expose discrimination and unreasonable rates which might constitute a barrier for programmers.

OVS regulations should also recognize the numerous distinctions in signal quality between digital and analog channels as stated in the comments of the MIT Communities. Of particular note is the need for the Commission to indicate that unless a programmer is providing a digital signal, programmers requesting a channel allocation on an OVS platform should be placed on an analog channel (MIT Comments at 15).

**NON-LECS PROHIBITED FROM BEING OVS OPERATORS:**

The Regional Cable Group municipalities strongly agree with the intent of Congress to prohibit non-Local Exchange Carriers (non-LECS) from declaring themselves to be an OVS operator. Examples of such non-LECS would be cable operators, multichannel microwave distribution system (MMDS) operators, and satellite television system operators. Section 602(7) of the Telecommunications Act of 1996 defines a cable system and clearly indicates that cable service does not include "...an open video system that complies with Section 653 (of Title IV)." Communications Act § 651(a)(4). Where OVS is referenced is in Part V of the Telecommunications Act which concerns "Video Programming Services Provided by Telephone Companies". This frame of reference clearly appears to exclude cable or other non-LECS from embracing the ability to declare themselves as OVS providers. Furthermore, the Conference Report to the 1996 Telecommunications Act stated clearly that the OVS approach encourage "...common carriers to deploy Open Video Systems and introduce vigorous competition in entertainment and information markets. Second, the conferees recognize that common carriers that deploy open systems will be 'new' entrants in established markets and deserve lighter regulatory burdens to level the playing field..." MIT Comments at 15-16, Conf. Rep. No. 104-458, 104th Congress, 2d Session, 178, (January 31, 1996)

By allowing Non-LECS to become OVS operators, the Regional Cable Group municipalities believe that competition will be impeded, and not introduced as Congress intended. Enabling cable operators to declare their platforms as Open Video Systems would serve to fortify the monolithic power of cable operators in the communities in which they operate. Such a fortification of power would, in the view of the Regional Cable Group, create a chilling effect which would discourage, rather than invite competition. The Regional Cable Group believes that this is not what Congress intended.

Moreover, the Regional Cable Group believes that allowing cable operators to become OVS operators would relinquish the authority of municipalities to enforce local franchise obligations under powers granted to municipalities by Congress under the Cable Communications Policy Act of 1984 and the Cable Consumer Protection and Competition Act of 1992. Cable operators could use their OVS operator status to abandon traditional obligations, such as provision of public, educational, and governmental access channels, nondiscrimination of service, and payment for the use of local rights-of-way. Public interests with respect to these aforementioned issues should be of utmost importance in determining whether cable operators should be allowed to operate Open Video Systems.

### LOCAL APPROVAL REQUIRED FOR OVS CERTIFICATION:

The Regional Cable Group is in agreement with comments submitted by the MIT Communities, and the National League of Cities that before an OVS operator is certified, such operator must obtain all local permits and approvals in order to use public rights-of-way. By requiring such consents, public concerns may be comprehensively addressed. The Regional Cable Group believes that Congress was aware of this concern through their express statement allowing municipalities to preserve local management over rights-of-way. It is also recognized that no language in the 1996 Telecommunications Act precludes an OVS provider from receiving a franchise, license, consent, or agreement to use public rights-of-way for either intercity point-to-point service or intracity direct-to-subscriber service.

The ability to manage local rights-of-way is an essential issue for the Regional Cable Group communities. Several concerns within this issue are of critical importance: the need for reasonable compensation for use; the invasive disruption caused by construction in the rights-of-way of Open Video Systems; the ability of poles and underground conduits to capably accommodate Open Video System wiring and appurtenances; and whether or not telephone companies are legally entitled to use rights-of-way for video services. Municipalities must have the authority to provide consent with respect to determining whether OVS is appropriate based on the outcome of these aforementioned concerns.

### Construction Disruption Concerns:

The construction of Open Video Systems by OVS operators is, by its very nature, invasive on public and private properties. The development of OVS wiring and architecture will require combined voice/video systems that will need to be installed in place of and not overlaid on top of existing plant. Systems currently operated by cable operators which presently cannot carry voice signals would need to be completely rebuilt, as those telephone systems which are not designed to carry video signals.

Rebuild construction by phone or cable companies in the Regional Cable Group communities will involve hundreds of miles of streets, highways, and easements in the Regional Cable Group communities. Disruption to neighborhoods will occur by construction equipment and vehicles for many months, if not years, to relocate lines on poles, replace poles altogether, and to retrench beneath streets and private property for underground conduit and lines. Coordination of this construction is necessary if one or more telecommunications providers are building Open Video Systems so that construction can be concentrated and disruption to citizens can be mitigated.

Where highway and major arterial construction is planned or taking place, municipal consent and coordination of OVS construction is essential so that relocation, installation, and burial of lines can take place prior to roadway construction. This coordination is vital at the local level where engineering and construction of roadway improvements are designed, scheduled, and implemented.

The concerns of private property owners with construction of OVS must be addressed by municipalities. The Regional Cable Group municipalities have established standards for restoration of private property by public utilities, including telephone companies, and cable operators. Private property owners, especially homeowners, are deeply concerned about damage done to trees, shrubs, and lawns by construction crews. Each of the communities in the Regional Cable Group have specific requirements which exclusively concern damage to private landscapes, including consent from property owners for cutting of trees, bushes, and shrubs. Compliance with such standards can be effectively enforced at the local level to the satisfaction of the property owner and with minimal penalty to the OVS operator.

Municipalities also experience concerns with the liability exposure which construction of OVS plant create. The massive undertaking of citywide construction which OVS will entail create considerable liability exposure for municipalities and their citizens. Municipalities must make all diligent efforts to minimize risks and liabilities which might occur to municipal operations and the public from construction along public rights-of-way. Adequate insurance against these risks is necessary in order for municipalities to protect their treasuries from the costs of errors, omissions, or accidents which occur on public properties. To this end, the Regional Cable Group communities have insurance and indemnification clauses within their franchises which provide for large amounts of insurance coverages, requirements that financially sound companies with high insurance ratings are accepted, requirements naming the municipality as a named insured, requirement of at least 30 days notice of cancellation or modification of policies, and allowing representation by counsel of the insurance company to defend the municipality.

The Regional Cable Group communities are also concerned about construction of the OVS plant at the residential level. Compliance with the National Electrical Code and National Electrical Safety Code is mandatory under ordinances within the Regional Cable Group municipalities. Grounding of cabling is especially important in that it is not unusual for telephone and cable companies to fail to ground service lines according to code requirements. Additionally, the Regional Cable Group municipalities believe that consent should be required of OVS operators with respect to assurances that electrical codes be followed, and with regard to provision of proper identification of technicians, installers, and other subcontractors to the extent that such personnel are properly trained and bonded to perform installation of OVS plant and equipment.

#### Rights-Of-Way Congestion Concerns:

In older sections of the Regional Cable Group communities where aerial pole-based plant can be found, space for additional wiring is very limited. Underground conduits and trenches have only limited space for new telecommunications providers. Along rights-of-way, underground trenches may contain wiring for some or all the following entities or services:

***	Electrical power	***	Security and Alarm Systems
***	Traffic signals	***	Police Communication Lines
***	Street lighting	***	Telephone Lines for Local Service
***	Cable Television	***	Long Distance Telephone Lines
***	Leased Computer Network Lines	***	Institutional Cable Network Lines
***	Private Telephone Lines	***	Alternate Access Telephone Lines

Many utility poles in the Regional Cable Group communities date back to the late 1940's or early 1950's. These poles were not designed to handle more than three line-based services. While undergrounding of most cabling has been in effect since the mid-1960's, underground trenches along major streets and highways are now experiencing congestion from a wide variety of power and communications uses.

Pole replacement in the Regional Cable Group communities will be an expensive alternative with a limited result. Pole changeouts which would be necessary to replace older poles can cost between \$10,000 and \$25,000 per pole based on the replacement pole size and number of lines and appurtenances which are placed on the pole. Excavation of streets to accommodate larger conduits generally costs well in excess of \$50,000 for a short distance.

The franchising and permit process used in the Regional Cable Group municipalities and other communities addresses these issues through requiring adequate notification and plans for excavation prior to approval. In Illinois, any entity planning an excavation, including telephone and cable companies, is required by State statute to notify the Joint Utility Location service for Excavators (JULIE) in order to locate lines, conduits, or other buried equipment prior to excavation. JULIE location services can often identify the level of congestion of wires and conduits within trenches. The Regional Cable Group communities have participated in this service for nearly a decade. JULIE compliance is also required in the cable franchises and permitting processes of the Regional Cable Group communities.

The purpose of JULIE along with notification and plan requirements is to reinforce the concept of adequate management of rights-of-way and easements by municipalities on behalf of and for the users of rights-of-way and easements. The Regional Cable Group municipalities believe that this local approach has actually served to promote more diverse forms of telecommunications within the Regional Cable Group communities. The requirements for permitting and JULIE notification are consistent between the communities, and are reasonable in their nature in order to promote further economic development. The issues related to street and rights-of-way excavation are highly localized, and it is the position of the Regional Cable Group communities that these issues are best addressed through a pre-certification of OVS providers.

Construction of Open Video Systems underscores the need for continued local administration of rights-of-way and public properties. The comprehensive scope of construction undertaken to build Open Video Systems will place more emphasis on JULIE compliance and on examination of plans by municipalities in order to coordinate aerial and underground construction with existing and planned roadway projects, construction of housing subdivisions, and commercial development. The extensive nature of an Open Video System may place literally every street and highway in the plans for trenching or overhead installation. Beyond the major disruption and inconvenience that will occur to citizens, municipalities must be able to factor OVS construction into the effect such construction will have on older streets in need of repair, and recently reconstructed roadways. Again, it is clear that continued local management of rights-of-way is essential for the orderly and efficient construction of Open Video Systems.

#### PRESERVATION OF PEG CHANNELS - OBLIGATIONS OF OVS OPERATORS:

The 1996 Telecommunications Act spoke clearly of the need for OVS operators to provide for carriage of public, educational, and governmental (PEG) programming. The Act indicated that an OVS operator be obligated to carry PEG programming to the extent that such obligations are "no greater or lesser" than those of existing cable operators. The National League of Cities and the MIT Communities have commented that an OVS operator should either be able to match existing PEG requirements of an incumbent cable operator or negotiate different requirements which are equivalent to those of the incumbent. The Regional Cable Group communities agree with this position.

Although a direct requirement to match obligation-for-obligation between an OVS operator and an existing cable operator would be the easiest method for preserving PEG on an OVS platform, the likelihood of an obligation-for-obligation matching requirement is slim. Changes in technology since original cable franchises were enacted, the need for studio facilities, along with staffing and training requirements which may no longer be appropriate, create a larger need for the ability to negotiate different, but equivalent, requirements which underscore flexibility and community needs and interests. In the Regional Cable Group communities, the existing cable operator has numerous obligations to provide PEG studio facilities, training, equipment, and staffing. Instead of reinventing the same requirements for an OVS operator, flexibility to "dollarize" the incumbent's obligation and require an OVS operator to match that "dollarized" amount would create a level of economic parity, while at the same time, enable PEG programmers to purchase additional equipment and improve the quality of their program offerings to the public.

To seal the commitments to PEG made by an OVS operator, the Regional Cable Group communities believe that an OVS operator should certify such commitments as part of an overall FCC certification process. Such certification of PEG commitments would constitute a proposed offer of commitment which municipalities could examine, discuss, and ultimately endorse.



As the MIT Communities have stated, endorsed offer would form a contract between the local franchising authority and the OVS operator which could be enforced in the same manner as any other contract with fewer regulations. In addition, such a contract could be modified through negotiations at any time, without the involvement of the Commission.

The Commission's NOPR queried about the idea of whether Open Video Systems serving multiple franchise areas should have a lesser level of PEG requirements. NOPR at ¶ 58. The Regional Cable Group communities have had, in essence, regional PEG requirements since 1981. Over the past 15 years, each incumbent cable operator starting with Warner AMEX (1981-85), then American Cablesystems (1985-88), and currently with Continental Cablevision (1988-present), have generally met local PEG requirements without extreme difficulty. These cable companies were not nearly as large as a telephone company, and were able to meet PEG requirements using mid-level technology which provides competent, though not "state-of-the-art", programming quality.

It is the belief of the Regional Cable Group that telephone companies using more advanced technology could easily meet PEG requirements, now or in the future. Telephone companies offering the argument that such requirements are impossible, are either reluctant to produce PEG programming themselves, or are looking for ways of escaping their obligations to carry PEG programming altogether.

Carriage of PEG programming is feasible on the analog or digital levels of an OVS platform. Presently, in the Regional Cable Group communities, PEG programming is being carried on a platform which is in the process of being converted from an all-coaxial trunk and feeder architecture, to a hybrid fiber-optic/coaxial plant which contains a fiber-to-the-node topology. The node topology which will be serving the Regional Cable Group community includes nodes which will serve approximately 500 homes. Such nodes will enable the cable operator to direct PEG programming to specific nodes or node clusters and the households they serve. This will enable the cable operator to direct programming to a specific community or school district, thus creating narrowcast programming within a larger broadcast cable environment.

Within the Regional Cable Group communities, an example of such narrowcasted programming is currently in effect. At present, each of the five communities provides governmental programming on Channel 6. Through backfeeds of such individual community programming to the cable operator through each community's Institutional Network (a specifically dedicated cable for use by local governments and schools), each community's households can watch programming created specifically for that community on Channel 6. This serves to release four analog channels which might have otherwise been reserved for governmental programming. This arrangement began while the cable system was all-coaxial, and will be continued under the hybrid fiber-optic/coaxial plant now under construction.

It is the position of the Regional Cable Group that the type of analog-to-digital hybrid fiber-coax plant envisioned for OVS platforms should be able to easily accommodate PEG programming which can be specifically directed to individual communities, school districts, community college districts, or other subdivisions of education or government within the Regional Cable Group communities.

By requiring that OVS operators meet PEG requirements equivalent to those of incumbent cable operators, Congress understood that communities are interested in using PEG channels to inform, educate, and entertain. PEG is especially designed to meet those needs by bringing citizens closer to their local governments and schools, and by enabling them through public access and local origination, to communicate directly with their neighbors. OVS operators seeking to avoid PEG requirements are attempting to evade responsibilities to the communities they serve by blocking access of OVS subscribers to programming generated by local governments, schools, and other sources. Rather than bringing the most precious fruit of competition to the public - more choice, opponents to PEG requirements on OVS are instead doing the opposite by offering no choice, one of the worst attributes of a monopoly.

Also, with respect to PEG requirements, the Regional Cable Group supports comments from the Alliance for Community Media and the MIT Communities that there must be equipment compatibility when PEG signals are received by an OVS operator from a PEG operator. Transmission of a PEG signal from an analog format to a digital format will required transport and conversion facilities which enable carriage of the signal on the OVS platform. This conversion will also be necessary for conversion of other sources of over-the-air and satellite programming which are also being transmitted using analog formats. It is essential that OVS operators be able to create such conversion and compatibility with signals emanating from several input points. Cable operators presently perform similar conversion of signals using modulators and demodulators at access points and their headends before a PEG signal goes out to cable subscribers.

Finally, it is important to note that under the umbrella of equipment compatibility, the issue of provision of equipment in general should be considered. Comments of the MIT Communities appropriately pointed out that the 1996 Telecommunications Act apply in accordance with Section 611 of the Cable Act (47 USC § 531) with respect to provision of PEG facilities and enforcement of provisions of such facilities. Comments in the House Committee Report, as the MIT Committees referenced, clearly indicate that Congress intended to require the Commission to give "substantial weight to the input of local governments..." when "...considering how to implement the capacity, services, facilities and equipment requirements for PEG use..." H.R. Report No. 104-204, 104th Cong. 2d Session, 105 (July 24, 1995). Congress clearly stated that PEG requirements of cable operators should be met by OVS operators also.

### COMPENSATION ISSUES:

The Regional Cable Group communities agree with positions previously stated by the MIT Communities, the National League of Cities, the Alliance for Community Media and others who state that the definition of franchise fees which include the definition of "gross revenues of the operator for the provision of cable service" in the 1996 Telecommunications Act be interpreted as broadly as possible in order to preserve a "level playing field" with respect to fair compensation as provided by the incumbent cable provider.

In addition, the MIT Communities, National League of Cities, the City and County of Denver, and others have raised a position regarding franchise fees grandfathered under the 1984 Cable Act wherein franchises enacted before 1984 with rates higher than 5 percent were allowed to continue. The 1984 Cable Act also grandfathered PEG requirements in Section 637 of the Act (Cable Communications Policy Act of 1984 § 637(a)(1); 47 USC §557 (a)(1)). In the Regional Cable Group communities, pre-1984 franchises are still in effect. These franchises have a maximum franchise fee of 5 percent, and PEG requirements which were grandfathered under Section 637. These requirements not only include provision of equipment, but also studio, training, staffing, maintenance and programming requirements as well.

The Regional Cable Group communities believe that the Commission should require OVS operators to be subject to the same obligations for PEG support as the incumbent cable operator, unless negotiated to be different. Also, the Regional Cable Group agrees with the statement by the MIT Communities which requests that the Commission recognize Congress' intent for regulatory parity when it specified that the fee in lieu of franchise fees "shall not exceed the rate at which franchise fees are imposed on the incumbent cable operator." Communications Act § 653(c)(2)(b). In 1984, Congress was careful to allow that additional support for PEG in excess of the franchise fees was grandfathered. The Commission should recognize this by stating that the franchise fees and PEG support paid by the incumbent cable operator is an effective rate which is actually paid by the incumbent and which should be required to be paid by an OVS operator as well. This effective rate should include an estimate of the value of non-cash and services (MIT Communities @ 37).


### CONCLUSION:

The Regional Cable Group Communities respectfully request the Commission to consider the aforementioned points regarding the issues of our member municipalities as Open Video System rules are further examined and created.

Respectfully Submitted,

MUNICIPAL SERVICES ASSOCIATES, INC.  
Consultant to the Regional Cable Group  
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